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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1906.

NO. 140.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
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W. A. WALKER, Executor of the estate of W. H. ANSLEY, deceased, Appellant

vs.

J. W. McLOUD, Trustee, and FRANCIS I. GOWEN, Receiver Appellees.

BRIEF FOR APPELLEES.

Appeal From the United States Circuit Court of Appeals for the Eighth Circuit.

JOHN W. McLOUD,
CHARLES B. STUART,
Attorneys for Appellees.

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The Choctaw Coal and Railway Company was authorized by Congress to construct lines of railway through the Indian Territory and to acquire rights of way of prescribed width. Edwin D. Chadick and acquire rights of way of prescribed width. Edwin D. Chadick was the general manager of such company. Conceiving, as he states in his testimony, that it was necessary for the company to house its employees, and on this accouat to occupy land not on the right of way, he entered into a contract with Fritz and Melvina Sittle, the former having the rights of Choctaw citizenship by marriage, the latter by blood, under which houses were to be erected on lands to which the said Fritz and Melvina Sittle were entitled

to the right of occupancy under the Choctaw laws, with other stipulations in such contracts not necessary now to be mentioned. Extensive improvements under this contract were erected on these lands, now constituting a part of the townsite of South McAlester, the money for such improvements, according to one phase of the evidence, being advanced by said Chadick from the funds of the Choctaw Coal and Railway Company without knowledge or authorization on the part of the proper officers of such Company, being advanced according to another phase of the testimony, with such knowledge and authorization . In the instrument between Chadick and the Sittels it was recited that the money advanced came from Messrs Hartshorne and Alderson, and the mortgage to secure them was contained in this instrument. The proof shows that the money did not come from them but was the money of the Company, advanced without the knowledge of its officers, as above stated. The Choctaw Company being insolvent, receivers were appointed by the United States Court in the Territory and its property sold to a new corporation known as the Choctaw, Oklahoma & Gulf Railroad Company. Proceedings were had touching the improveemnts built with the money of the Choctaw Coal and Railway Company, as aforesaid, in the United States Courts in the Territory, which will be adverted to hereafter. While this status was yet existing, William Ansley, deputy sheriff of Tobucksy County, Choctaw Nation, Indian Territory, by virtue of a statute of the Choctaw Nation not providing for a hearing in court or legal proceedings of any kind, sold for a pretended consideration of $270.00 to W. H. Ansley certain property in the deed to said Ansley fully described and set

out (R. 20,) and in consideration of a pretended consideration of $70.00 sold other property on said date to one James Pusley, which property is in his deed to said Pusley set out and described (R. 21,) and on the same date for a consideration not stated sold to E. T. Richards other improvements in the deed to said Richards described (R. 15-18). On December 9, 1895, for a recited consideration of $1.00 James Pusley conveyed the property purchased by him to the plaintiff W. H. Ansley. On the same day E. T. Richards, for a recited consideration of $1.00 conveyed the property purchased by him to the plaintiff W. H. Ansley (R. 23, 24,) all of this property being improvements erected with the money of the Choctaw Coal & Railway Company, as above detailed. In point of fact, according to the testimony of W. H. Ansley, neither he nor Richards, nor Pusley, paid anything in cash upon their bids, but gave their notes for the amounts of their respective bids with the understanding that the notes were to be paid when they were put in possession by the Nation (R. 56), or, in the language of William Ansley, deputy sheriff. who made the sale, "I accepted notes to the sheriff and his successor in office for said amount, conditioned that the same be paid as soon as the purchaser was put in possession by the Nation or obtained possession otherwise, which notes have been turned over to the present sheriff of Tobucksy County." (R. 50.)

W. H. Ansley, the plaintiff, further testifies that the consideration from him to Pusley and Richards for conveying their purchase to him was $1.00, with the understanding that he was to do what was right about it, because they knew it was a lawsuit, and he was to pay them whenever it was settled. (R. 56.) The improvements

claimed to have been acquired by plaintiff through this sale cost $85,957.04 (R. 31-32.) One of the buildings, known as the Kali Inla Building, purchased by plaintiff at this sale was, in his opinion, of the market value of $30,000 or $40,000, and the amount of his bid on this particular piece of property was $125.00 (R. 55.)

The argument against plaintiff's claim of right based upon the sale aforesaid presents the following contentions:

1. That this action is improvidently brought against the parties defendant for the reason that such parties had been discharged from their official duties and the property in controversy had passed to other hands when this suit was instituted.

2. That the complaint in this case is insufficient to confer jurisdiction upon a court of equity to remove cloud from title, because (a) it does not show that plaintiff has the paramount legal title, (b) nor that plaintiff is in possession of the premises in controversy, (c) but does show that the defendants are in such possession.

3. That the statutes of the Choctaw Nation did not authorize the sale made by William Ansley, as deputy sheriff of Tobucksey County, under the circumstances disclosed by the record.

4. That if the Choctaw statute authorized the things done by William Ansley, deputy sheriff, in making the sale, then such statute and the proceedings thereunder are nullities, because by force of the Choctaw statute and of the proceedings thereunder it was sought to adjudicate matters and issues of which only the courts of the United States in the Indian Territory had jurisdiction.

5. That if the Choctaw statute authorized the sale as made,

then such sale is a nullity because the Choctaw statute and the proceedings thereunder are in violation of the "due process" clause of the United States Constitution.

6. That if the statute authorized the sale and is constitutional, such sale is a nullity and ineffectual to pass any right to plaintiff (a) because of the failure of the officer to comply with the terms of the Choctaw statute, and (b) because, under general rules of law, of the inadequacy of the consideration and the circumstances of fraud attendant upon the sale.

I.

This action is improvidently brought against the parties defendant for the reason that such parties had been discharged from their official duties and the property in controversy had passed to other hands when this action was brought.

This action is brought against Francis I. Gowen as receiver of the Choctaw Coal and Railway Company under allegation of appointments of such Francis I. Gowen as receiver by the United States Court for the Central District of the Indian Territory, September 19, 1891 (R. 1); it is brought against J. W. McLoud as trustee acting under a certain deed of trust executed on the 23rd day of October, 1890, by Fritz Sittle and Melvina Sittle to Edwin D. Chadick, trustee, to secure the payment of $45,000, alleged to have been furnished and advanced by Charles Hartshorne and William A. Alderson of Philadelphia, Pennsylvania, and their associates, which sum had been expended in the erection of the houses and improvements in controversy (R. 16, 17,) it having been found by the United States Court for the Central District of the Indian Ter-

ritory, in a certain cause therein entitled Edwin D. Chadick, trustee, vs. The Receivers of the Choctaw Coal and Railway Company, that while said deed of trust declared that the money used in the construction of said houses was advanced by Chas. Hartshorne and William A. Alderson and their associates, no part of the same was advanced by the said Hartshorne or Alderson, neither of whom knew of the said deed of trust until long after its execution; that said Chadick while manager of the Choctaw Coal and Railway Company advanced money of said company to the amount of $85,597.04, which money was used in the erection of the houses mentioned in said deed of trust; that Hartshorne was the president and Alderson was the treasurer of the Choctaw Coal and Railway Company at the time of the execution of said deed of trust, that the same was given with the intent to secure the party actually advancing the money thereon to the amount of $45,000 with interest at 6 per cent from October 23, 1890; that on the 14th day of February, 1894, said Hartshorne and Alderson and said Choctaw Coal and Railway Company by its president appointed J. W. McLoud substitute trustee in lieu of said Chadick with the powers conferred by said deed of trust, which appointment was concurred in by J. W. Throckmorton and Francis I. Gowen, receivers of the Choctaw Coal and Railway Company; that said McLoud was in the judgment aforesaid declared to be the legal and proper trustee for the Choctaw Coal and Railway Company under said mortgage and deed of trust and as such trustee entitled to exercise all the powers conferred therein and thereby upon such trustee, etc. (18, 32) It is alleged in the complaint that McLoud, trustee, is about to sell and will on Mon-

day, December 30, 1895, sell the property sued for, except Lot 12 in Block 46 and the improvements thereon situated. Allegations of possession and control are made against the said McLoud as trustee and the said Gowen as receiver. Complaint was filed December 13, 1895. The record shows that on July 17, 1894, in cause No. 169, styled Langhorne Wister et al vs. Choctaw Coal and Railway Company et al., the United States Court for the Central District of the Indian Territory ordered the sale, on the 8th day of December, 1894, of all the property of the Choctaw Coal and Railway Company then in the hands of the receivers of said court unless the payment of certain indebtedness of the Company should be made before said date (R. 74), that by virtue of such order such property was sold on the 8th day of December, 1894, to George H. Earle, Jr., Sidney F. Tyler, Francis I. Gowen, George E. Kirkbride, Nicholas Thouron, a committee appointed by the stockholders and creditors of the Choctaw Coal and Railway Company (R. 60, 61;) that on the 11th day of December, 1894, such sale was confirmed (8,) the master commissioner who had made the sale being directed to receive within thirty days the balance of the purchase money, and upon payment thereof to execute and deliver in conjunction with the Choctaw Coal and Railway Company a deed for such property to the purchasers, the form of said deed being by such order directed and approved (R. 73;) that within the thirty days fixed the balance of the purchase money was paid and the deed executed, acknowledged and delivered as directed (R. 101, 102, 103;) on October 13, 1894, the proceedings of the special master commissioner were confirmed and approved and the execution and delivery to the purchasers of the

deed of conveyance of the property and franchises of the railway company was also approved, and possession of the railroad property and franchises was vested in said purchasers, and the receiver was directed to hand over and deliver to them the said railroad property and franchises, and was further ordered to pass his final accounts before the master with all convenient speed. (R. 103, 104.)

On the second day of March, 1895, in said cause it was adjudged by the court that such receiver be discharged as receiver and that this case be dismissed except for the purpose hereinafter stated. The decree reads:

"And it further appearing to the court that the purchasers of said property at judicial sale bought the same subject to the liabilities and idebtedness of the receivership, lawfully incurred and not satisfied out of the proceeds of said sale, and further subject to all executory contracts made by the receiver under the authority of the court, it is ordered, adjudged and decreed that the court reserves and retains jurisdiction of this cause, and over the property of said company which was sold to the purchasers thereof at judicial sale, for the purpose of determining in this cause all such claims, liabilities and demands, and for the further purpose of fully protecting said receiver against any liability on any claims or demands existing or to exist against him, and for the purpose of protecting those having lawful claims against the receivership. The liabilities thusassumed by the purchasers of said property are as follows: All lawful claims not barred by the statute of limitation against Edwin D. Chadick and Francis I. Gowen, as joint receivers, accruing between January 8, 1891, and August 28, 1891, inclusive

of both dates, which have not heretofore been paid. Second. All claims not barred by the statute of limitation against Francis I. Gowen as acting receiver between August 28, 1891, and June 14, 1893. Third. All lawful claims not barred by the statute of limitations against James W. Throckmorton and Francis I. Gowen, receivers, accruing between June 14, 1893, and April 21, 1894, inclusive of both dates. Fourth. All lawful claims not barred by the statute of limitations agaist Francis I. Gowen, sole receiver, accruing between April 21, 1894, and October 3, 1894.

"It is further ordered, adjudged and decreed by the court that the above entitled cause, being cause No. 196 on the Equity Docket of this court, be and is retained and kept open for the purpose of ascertaining and determining all claims, demands and liabilities against said receivership and against property that was in the possession of said receivers and surrendered by them to the purchasers thereof. All such claims, demands and liabilities shall first be presented to the Choctaw, Oklahoma & Gulf Railroad Company, and if not paid, or if amicable adjustment of the same cannot be had, within a reasonable time, persons presenting such claims or demands shall have the privilege and authority of presenting them to the court by intervention in the above entitled cause for the purpose of having the same ascertained and determined in and by such intervention proceeding, and any orders, judgments or decrees so rendered by the court in such proceedings may be enforced and shall only be enforced against the property of said railroad company to the same extent that judgment could have been enforced if said property had not been surrendered into the possession of said Choctaw, Oklahoma

& Gulf Railroad Company, or was still in the possession of said receiver. Such intervention proceedings must be filed in this cause in this court on or before the first day of January, 1895 and after that no further intervention shall be permitted in this cause, and the rights of all claimants who shall not on or before that date have commenced intervention proceedings to avail themselves of the remedies herein provided for their benefit shall cease and determine, and such claims shall be barred and shall not be a charge on the property of said company; provided that when any such intervention procedings are filed in this court, due and legal notice of the same shall be given to the said Choctaw, Oklahoma & Gulf Railroad Company.

"It is further ordered, adjudged and decreed that nothing in this decree contained is intended to affect or shall be construed as affecting the status of any pending or undetermined litigation in which the receiver of said company appears as a party, and such litigation may be continued to final determination in the name of the receiver, but for the use of the Choctaw, Oklahoma &Gulf Railroad Company, and at its cost and expense and with the right of that Company should it be so advised, to appear and be substituted in any such litigation." (R. 70, 71, 72.)

It thus appears that the receiver sued in this action had been finally discharged for many months prior to the institution of this suit; that whatever equities the Choctaw Coal & Railway Company had in this property by virtue of the improvements having been made with its money had passed to the Choctaw, Oklahoma & Gulf Railroad Company, a corporation liable to suit; that the rights

asserted in this action are not "claims of the kind on account of which the court retained jurisdiction of the receivership cause; that if the claim here asserted could by any possibility be regarded as falling within the class of those claims on account of which the court retained jurisdiction of the cause, then that this action is barred by the terms of the order, because it has not been maintained by intervention proceedings, as provided by the terms of said order.

After the discharge of a railroad receiver no action can be maintained against him where the property formerly in his custody has been transferred to a purchaser under an order of the court in foreclosure proceedings.

Planters' L. & T. Co. vs. Central R. Co., 7 Fed. Rep. 537.

Davis vs. Duncan, 19 Fed. Rep. 477.

New York Tel. Co. vs. Jewett, 115 N. Y. 166.

Bond vs. State, 68 Miss. 648.

Ryan vs. Hayes, 62 Tex. 42.

Brown vs. Gay, 76 Tex. 444.

This proposition undoubtedly disposes of this cause so far as the defendant Gowen is concerned.

It must have like effect as to the defendant McLoud, because plaintiff by specific pleading of instruments and allegation of fact discloses that its action against McLoud is by virtue of his holding the property under the trust deed for the benefit of the Choctaw Coal and Railway Company, in conjunction with and in subordination to the receiver of such company, Francis I. Gowen; that in this capacity and by virtue of this relation plaintiff brings this action against him jointly with said Gowen, whereas the records dis-

closes that long before the filing of this suit all rights of the Choctaw Coal and Railway Company in the property in controversy, by virtue of said deed of trust, had passed to the Choctaw, Oklahoma & Gulf Railroad Company, and that Gowen had been discharged as receiver.

II.

The complaint in this case is insufficient to confer jurisdiction upon a court of equity to remove cloud from title for three reasons: (a) it does not show that plaintiff has the paramount legal title; (b) nor that plaintiff is in possession of the property in controversy; (c) but does show that the defendants were in such possession.

This is an action in equity to acquire possession of property, to remove cloud from the title thereof, and to be quieted in the possession thereof. Before a party can maintain this action in a court of equity he must have the paramount legal title. Dick vs. Foraker, 155 U. S. 414; Holland vs. Challen, 110 U. S. 525; Frost vs. Spitley, 121 U. S. 557; Adoue vs. Strahan, 97 Fed. Rep. 691; Guarantee Co. vs. Delta Co., 110 Fed. Rep. 69.

It cannot be claimed for a moment that complainant had for or could acquire the paramount title to the land in controversy; such title was in the Choctaw and Chickasaw nations by virtue of a patent from the United States. The lands of these Nations are now in process of partition under acts of Congress and treaties made with the different tribes. The utmost rights in lands which complainant could acquire was a bare possessory or right of occupancy under the laws of the Choctaw Nation.

Plaintiff cannot maintain this action because it appears from

his complaint that he was not in possession of the premises in controversy. Dick vs. Foraker, 155 U. S. 414; Frost vs. Spitley, 121 U. S. 552, 55-6.

Finally, plaintiff cannot maintain this action because it appears from his complaint that the defendants were in possession, the action of ejectment being for plaintiff an entirely adequate remedy at law. Aduoe vs. Strahan, 97 Fed. Rep. 691; Davidson vs. Calkins, 92 Fed. Rep. 239; Whitehead vs. Shattuck, 138 U. S. 146; Hudson vs. Randolph, 13 C. C. A., 402; Fed. Rep. 216.

These principles are recognized and enforced by the Arkansas courts, whose decisions are persuasive because our practice act is drawn from that state. Thus in Brown vs. Bosquire, 57 Ark. 106, it is said: "The action to quiet title proceeds upon the fact of plaintiff's possession when suit is commenced, and the complaint always tenders that issue." And in Ashley vs. Little Rock, 56 Ark. 399, it is said: "It is well settled a court of equity has no jurisdiction to remove cloud on title against one in possession claiming adverse title."

It is true that by a statute of Arkansas enacted March 26, 1891, a bill to remove a cloud on title is authorized whether or not the complainant is in possession. (Ark. Stats. of 1891, p. 132.) This statute, and similar ones, have been held unconstitutional in the United States Courts. Adoue vs. Strahan, 97 Fed. Rep. 692. Whether this statute be constitutional or not is entirely immaterial in this controversy as it has never been put in force in this Territory by act of congress. Its enactment, however, confirms the position taken by the courts of Arkansas, prior to its enactment,

that a complainant can not have an action to remove cloud against a defendant in possession and claiming adversely.

III.

The statutes of the Choctaw Nation did not authorize the sale made by William Ansley, as deputy sheriff of Tobucksey County, under the circumstances disclosed by the record.

The Choctaw statute under which the sale by virtue of which plaintiff claims title was made is as follows:

"All non-citizens not in the employ of a citizen of the Choctaw Nation and not authorized to live in the Choctaw Nation under the provisions of existing treaty stipulations, who have made or bought improvements in said Nation, are hereby notified that they are allowed to sell their so-called improvements to citizens, and if such non-citizens fail to comply with this section, then it shall be the duty of the sheriffs of the counties in which such improvements may be located to advertise the same for sale within thirty days and sell the same to the highest Choctaw citizen bidder for cash, one-half of which shall be paid into their respective treasuries and the other one-half into the National Treasury, provided however that if any such non-citizen fail or refuse to deliver the possession of such an improvement, he shall be reported by the sheriff of that county to the principal chief and by said chief to the United States Indian Agent to take proper steps for the removal and prosecution of such offender under Sec. 2118 of the Revised Statutes of the United States; provided further, that the notice of sale shall be posted by the sheriff in three public places in his county, which shall be legal notice to all persons against whom this law may operate." (R. 59.)

It will be perceived at once that this statute is ambiguous. It provides for advertisement by the sheriff "for sale within thirty days." It further provides for notice of sale. It provides that any non-citizen might sell his improvements to citizens but does not provide within what time such sale should be made. It provides that if any non-citizen fail or refuse to deliver possession of an improvement he shall be reported by the sheriff of that county to the principal chief and by that chief to the United States Indian Agent. It does not state directly whether this delivery of possession should be before sale or afterward. This statute must be read in the light of the fact that the Indian Government could not proceed against a citizen of the United States directly, but only by request to the United States Indian Agent,. upon whom was conferred statutory power in the premises. Art. 7 of the Treaty of 1855 provides for the removal of intruders, not by the Choctaw authorities, but by the United States Agent. Art. 14 provides that the United States shall protect the Choctaws and Chickasaws from domestic strife, from hostile invasion and from aggression by other Indians and white persons not subject to their jurisdiction and laws. Section 2118 of the Revised Statutes of the United States confers upon the president power to take such measures and to employ such military force as he may judge necessary to remove any person from the Indian lands.

To read the provisos as requiring the sheriff before advertisement and sale to give notice to the non-citizen to deliver the possession of the premises, failing which he should be reported for removal, and in the event of his complying with this notice or being

removed by the agent, then to advertise the vacated improvements for thirty days and to sell same as required, is to give consistency to all the provisions of the law, to give meaning both to the requirement of advertisement and of notice, and to make the statute consistent with the removal statute of the United States. To place the other construction upon the statute is to assume that notice and advertisement mean the same thing; that the sheriff should sell the improvements without notice to the non-citizen to vacate the same, but should require him to vacate after the sale, and if he should then fail so to do report this fact to the Indian Agent, involving this absurdity, that the Indian Agent might find that the non-citizen came within some of the provisions of the law authorizing him to remain in the Territory and occupy land and might refuse to remove him, involving the further consequence that the sale of the premises before they had been vacated by the non-citizen or before removal by Agent would necessarily tend to bring the non-citizen into collision with the Indian authorities and with the purchasers at such sale, the very consequences which all laws and treaties with the Indians desired to avoid. The one construction has due regard for the power of the agent, in that it invokes his judgment upon matters finally to be determined by him before action by tribal authorities; the other authorizes tribal action in advance of any determination by the agent and with the possibility that such action might be rendered nugatory by the finding of the agent that the person was authorized to live in the Choctaw Nation under the provision of laws or treaties. The intention must be imputed to the Choctaw government to act in the enactment of Laws in accordance with

the constituted authority of the United States. All of these considerations lead irresistibly to the conclusion that the proper construction of this ambigious statute is that the Indian sheriff should give notice to the non-citizen of his purpose to sell and make demand for possession, upon the failure of such non-citizen to deliver the possession, to report him to the Indian Agent for removal and upon the vacation of the premises or upon such removal by the Agent to then sell the improvements after advertisement for thirty days.

If this construction be sound, then the proceedings of the Indian sheriff were entirely without effect, because it does not appear that notice was given or demand made of the defendants to deliver up possession of the property in controversy before the sale by the sheriff, or that they were reported to the Indian Agent as required by the statute.

IV.

Such sale was a nullity because by force of the Choctaw statute and of the proceedings thereunder it was sought to adjudicate matters and issues of which only the courts of the United States in the Indian Territory had jurisdiction.

Article 7 of the Treaty of 1855 between the United States and the Choctaw and Chickasaw Tribes of Indians was as follows: "So far as may be compatible with the Constitution of the United States and the Laws made in pursuance thereof, regulating trade and intercourse with the Indian Tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government and full jurisdiction over persons and property within their respective limits, excepting, however, all persons with their property who

are not by birth, adoption or otherwise citizens or members of either the Choctaw or Chickasaw Tribe, and all persons not being citizens or members of either tribe found within their limits shall be considered intruders and be removed from and kept out of the same by the United States Indian Agent, assisted if necessary by the military, with the following exceptions, viz: Such individuals as are now or may be in the employment of the government and their families, those peacefully traveling or sojourning in the country or trading therein under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws with the assent of the United States Indian Agent to reside within their limits without becoming citizens or members of either of said tribes."

Article 43 of the Treaty of 1866 provides: "The United States promise and agree that no white person except officers, agents and employes of the government and of any internal improvement company, or persons traveling through or sojourning in said Nations or either of them, shall be permitted to go into said Territory, unless formally incorporated and naturalized by the joint action of the authorities of both Nations, into one of the said Nations or Choctaws or Chickasaws, according to their laws, customs or usages, but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics, or skilled in agriculture, or to prevent the Legislative authorities of the respective Nations from authorizing such work of internal improvement as they may deem essential to the welfare and prosperity of the community, or be taken to inter-

fere with or invalidate any action which has heretofore been had in this connection by either of said Nations."

The effect of Article 51 of said Treaty is to leave in force all treaties and parts of treaties theretofore made not inconsistent with the Treaty of 1866.

Section 2118 of the Revised Statutes of the United States reads: "Every person who makes a settlement on any lands belonging, secured or granted by treaty with the United States, to any Indian Tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees or otherwise, is liable to a penalty of $1,000. The president may moreover take such measures and employ such military force as he may judge necessary to remove any such persons from the land."

Sec. 2147 of the Revised Statutes of the United States reads: "The Superintendent of Indian affairs and the Indian Agent and Sub-Agents shall have authority to remove from the Indian Country all persons found therein contrary to law, and the president is authorized to direct the military force to be employed in such removal."

It will be observed that under the treaty provisions certain classes of persons were permitted to live within the limits of the Choctaw and Chickasaw Nations, and necessarily to occupy lands therein. It will be recalled that the act under which this sale was made excludes from its operation all non-citizens not in the employ of a citizen of the Choctaw Nation and not authorized to live in the Choctaw Nation under the provisions of existing treaty stipulations.

In Section 6 of the Act of Congress of March 1, 1889, establishing a United States Court in the Indian Territory, it is provided, "That the court hereby established shall have jurisdiction in all civil cases between citizens of the United States who are residents of the Indian Territory or between citizens of the United States or any State or Territory therein and any citizen of or any person or persons residing or found in the Indian Territory, and when the value of the thing in controversy or damages or money claimed shall amount to one hundred dollars or more.

The act of May 2, 1890, provided that the United States court in the Indian Territory should have jurisdiction "in all cases on contracts entered into by citizens of any Tribe or Nation with citizens of the United States in good faith and for valuable considerations and in accordance with the laws of such Tribe or Nation, and such contracts shall be deemed valid and be enforced by such courts, and in all cases over which jurisdiction is conferred by this act, or may hereafter be conferred by act of congress; and the provisions of this act hereinafter set forth shall apply to said Indian Territory only.

Other provisions of said act read: "That no attachment shall issue against improvements on real estate while the title to the land is vested in any Indian Nation, except where such improvements have been made by persons, companies or corporations operating coal or other mines, railroads or other industries under lease or permission of law of an Indian National Council or charter or law of the United States; that executions upon judgment obtained in any other than Indian courts shall not be valid for the sale or convey-

ance of title to improvements made upon lands owned by Indian Nations except in the cases wherein attachments are provided for. Upon a return of nulla bona upon an execution upon any judgment against an adopted citizen of any Indian Tribe, or against any person residing in the Indian Territory not a citizen thereof, if the judgment debtor shall be the owner of any improvements upon real estate in the Indian Territory in excess of 160 acres occupied as a homestead, such improvements may be subjected to the payment of such judgment by decree of the court in which such judgment was rendered. Proceedings to subject such property to the payment of judgments may be by petition, of which the judgment debtor shall have notice as in the original suit. If on hearing the court shall be satisfied from the evidence that the judgment debtor is the owner of improvements on real estate subject to the payment of said judgment, the court may order the same sold and the proceeds, or so much thereof as may be necessary to satisfy said judgment and costs, applied to the payment of said judgment; or the improvement is of sufficient rental value to discharge the judgment within a reasonable time, the court may appoint a receiver who shall take charge of such property and apply the rental receipts thereof to the payment of such judgment under such regulations as the court may prescribe. If under such proceeding any improvement is sold, only citizens of the tribe in which said property is situated may become a purchaser thereof."

It appears from the foregoing review of statutory and treaty provisions:

(1) That there were classes of persons not members of a tribe

who could live within the limits of the tribe, occupy lands, and own improvements therein.

(2) That by treaty of 1855 the jurisdiction of the tribal authorities over the person and property of individuals not members of the tribe was expressly excluded.

(3) That by the provisions of the Revised Statutes of the United States the power to protect the tribal lands from encroachment by non-citizens was vested in the president of the United States and in the superintendent of Indian Affairs and agents and sub-agents.

(4) That the Act of Congress creating a United States court in the Indian Territory and enlarging its jurisdiction, enacted doubtless in recognition of the changed condition of affairs in the Indian Territory and the presence therein of hundreds of thousands of United States citizens, made an advance over all previous legislation in providing that the contract entered into by citizens of any tribe or nation and citizens of the United States under the conditions above set out should be valid and should be enforced by such courts. As the validity of the contract was a condition precedent to its being enforced by the court, it necessarily followed that the court acquired jurisdiction of causes growing out of such contracts in order to determine the validity of the same.

Such law further recognized that persons operating coal or other mines, railroads, or other industries might make improvements on Indian lands under lease, and that persons residing in the Indian country not citizens thereof might be the owner of improvements upon real estate which could be proceeded against according

to the procedure in such act set forth.

These statutes enacted in recognition of the charges taking place in the Territory, as before suggested, are in line with that policy of congress which has finally found expression in laws whereby non-citizens are not only permitted to hold and own the improvements made by them on lands in the Indian Territory within the towns, but by virtue of such improvements to acquire title in fee to such lands upon payment of a percentage of the appraised value thereof. These provisions not only reinforce the conclusion drawn from the provision of the treaty that the Indian authorities could not exercise jurisdiction directly or indirectly over the persons or property of individuals not members of the tribe, but establish further that right could be acquired in respect to such improvements which before these acts of Congress had not been recognized and that in regard to such rights jurisdiction to adjudicate and determine the same was conferred upon the courts of the United States in the Indian Territory. This is believed to be sound conclusion from these statutes, but it might be unsound and yet not impair the alternative contention that the Indian authorities did not have jurisdiction over rights or claims of non-citizens, but that its redress against these must be made by appeal to the proper authorities of the United States, viz. the President, the Commissioner of Indian Affairs, the Indian Agents and Sub-Agents.

In the case at bar it appears from the record that the improvements in question were made by a railroad company operating a line of road in the Territory by virtue of a lease made under a contract of its manager, Edwin D. Chadick, with two Choctaw citizens,

Fritz and Melvina Sittle. This contract, if valid, the United States court in the Indian Territory had power to enforce. The power to enforce it if valid necessarily drew with it jurisdiction to determine its validity. Whether this jurisdiction precluded the tribal authorities from making appeal to the Indian Agent for removal of trespassers upon its land is a question that need not be determined, for the conclusion seems to be irresistable that the executive authorities of the United States and the United States courts in the Indian Territory, separately or concurrently, had exclusive jurisdiction to determine the questions of the unlawful making of the improvements in question and that the act of the Choctaw Council, if it authorized the Indian sheriff to proceed against such improvements independently of the United States authorities, was an attempt to encroach upon jurisdiction not vested in the Choctaw authorities but vested in the United States authorities. If, however, the construction of the Choctaw act contemplated an appeal to the Indian Agent first and the sale of the vacated improvements by the sheriff after such vacation, then such act would have been within the power of the Choctaw authorities, and the consideration here urged sustain the argument heretofore made that this is the proper construction of the Choctaw Act.

V.

Such sale is a nullity because the Choctaw statute and the proceedings thereunder were in violation of the "due process clause" of the United States Constitution.

It has never been believed heretofore that a party could in this country be adjudged to be guilty by legislative act or have his guilt

determnied by an executive officer. It has been believed that no person could be deprived of property by assuming his guilt and visiting the penalties of the law upon him without a hearing, without judicial ascertainment of the grounds for forfeiture and without the right of making a defense. By Article 7 of the Treaty of 1855 the Choctaws were given the unrestricted right of self-government so far as might be compatible with the Constitution of the United States. By the Act of Congress of 1890, heretofore cited, it was provided that the Constitution of the United States should have the same force and effect in the Indian Territory as elsewhere in the United States. Apart from these provisions, it is believed that the Constitution of the United States was in force in the Indian Territory ex vigore, so far as the fundamental safeguards of personal and property rights were concerned, among which the provision that no person shall be deprived of life, liberty or property except by due process of law stands first.

The first objection to the Choctaw statute and to its enforcement by an executive officer is that it violates the implied limitations resulting from the division of government into three departments. The faculty of judgment is neither legislative nor executive, but judicial. The function of determining whether an individual has been guilty of an infraction of law and must suffer its penalties is a judicial function and cannot be exercised by a legislative body, nor be conferred by it on the executive branch of the government. Thus the federal constitution declares that "all legislative power herein granted shall be vested in a Congress of the United States," that the executive power of the United States shall be vested in a

President, and that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish. By the first of these provisions the President and the courts are prevented from making laws. By the second, congress and the courts are forbidden to usurp the functions of the executive. By the third, the courts would be justified in declaring invalid any act of congress or act or rule of the executive department which should amount to an attempted exercise of judicial power. Black's Constitutional Law, p. 79. Any act of legislation which undertakes to determine questions of fact or law as affecting the rights of persons or property properly the subject of litigation would be judicial in its character, and therefore invalid. Thus to ascertain that a deed to a private corporation is conditional, that here has been a breach of the condition and to enforce a forfeiture for breach are judicial functions which it is not within the competency of legislative power to exercise. Id. 80. Board of Education vs. Bakewell, 122 Ill. 339 (10 N. E. Rep. 378.) Although to a considerable extent the rules of evidence are under control of the legislature, it is not competent for that body to make a rule which shall in effect finally determine controversies and deprive the courts of their function. Thus a tax deed cannot be made conclusive of the facts in the controversy in which it appears. Id. 82. A statute and preclude the owner of the original title from showing its invalidity would be void, because not being a law regulating evidence but an unconstitutional confiscation of property. Cooley on Constitutional Limitations, 16 Ed. page 453 and authorities in Note 1. And a statute which should make a certificate or opinion of an of-

ficer conclusive evidence of the illegality of an existing contract would be equally nugatory. Id. 453. Young vs. Beardsley, 11 Page 93.

Furthermore, "a party cannot by his misconduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form. Forfeitures of rights in property cannot be adjudged by legislative act and confiscations without judicial hearing after due notice would be void as not being due process of law." Cooley, Constitutional Lim., 6th Ed. 444 and cases cited in foot note.

The congress it has been held has no power to protect parties assuming to act under the authority of the general government during the existence of civil war by depriving persons illegally arrested by them of all redress in the courts. Id. 445. Griffin vs. Wilcox, 21 Ind. 370, Johnson vs. Jones, 44 Ill. 142, Hubbard vs. Brainard 35 Conn. 563.

Furthermore, looking at the proceeding in this case as a proceeding in rem conducted by an executive officer, it lacks two things indispensable to the validity of such proceedure,—seizure of the property and notice to the owners, for it does not appear that the property was ever taken into custody by the officer or that he ever gave notice to the owners thereof to appear before him and show cause why such property should not be sold. In his work on Proceedings in Rem., Art. 42, page 54, Mr. Waples says: "Seizure is the initial step in proceedings against a thing. What arrest is in criminal prosecutions against a person seizure is in a prosecution against a thing. What citation is in a personal civil action, seizure

is in the **actio in rem** so far as it is notice to all interested. It is absolutely essential to the existence of the action, to the jurisdiction of the court, to the validity of the condemnation. Without seizure the change of title by forfeiture could not be judicially ascertained, as without due civil process a case of disputed title between two citizens could not be decided unless the process should be waived by the consent of the parties. In almost all actions against things the object of the complaint is to have the change of title by forfeiture declared and his rights thus arising decreed. Art. 43. Where the seizure is insufficient the regularity of the following proceedings will not avail to prevent the whole case from being inoperative, from being like a fabric without foundation which must fall to the ground. A defective seizure cannot be made effective without the repair of the defects. To cure it we must make it sufficient. The remedy must be administered to the seizure itself so as to make it whole. So long as it remains insufficient, no pleading or judicial order, nor even admission by the claimant which do not concede the legality of the seizure can lead to lawful condemnation of the thing. Let it be never questioned that proceedings in rem are void ab initio without seizure sufficient; that there is no reliable decision and can be none to that effect that insufficient seizure can be cured by any thing less than the making of it sufficient. To seize real estate notice of seizure must be served upon the tenant in possession. Id. 64.

In Chapter 8 he discusses the indispensability of notice, and how seizure supplemented by advertisement constitutes notice. In discussing jurisdiction of the court he says (page 120:)

"2. When seizure has been made and the res brought into court the power of the court is confined to the custody of the res, the sale of it when perishable (that its form may be changed to money), and to other necessary orders.

"3. When the libel has been filed and notice given, and the legal delay has expired (whether there has been any response to notice or not) jurisdiction to hear and determine the status of the res arises."

But it is contended that there is a kind of forfeiture not the result of judicial ascertainment, but inherent in the statute itself. It is true that in the case of Smith vs. The State of Maryland, 6 Cranch 283, it was held that an act of the State of Maryland confiscating the property of British subjects, followed by another statute appointing commissioners to preserve the British property confiscated and seized by the former law and declaring the said commissioners to be in full actual seizin and possession of all British property seized and confiscated by the said act, was upheld as a measure emanating from the war power, the confiscation act having been passed before the adoption of the Constitution. But in the case of Terrett vs. Taylor, 9 Cranch 42-43, the Supreme Court denied to the Legislature of Virginia the power by its act to repeal and revoke a former act of the Legislature of that State confirming to the church its rights to the church lands. And in the case of Fairfax vs. Hunter's Lessee, 7 Cranch 602, the Supreme Court, through Judge Storey, said: "It is incontrovertibly settled upon the fullest authority that the title procured by an alien by purchase is not divested until office found." He held therefore that notwith-

standing the acts of Virginia confiscating the property of British subjects and the grant of these lands by the State to Hunter, that the title of Fairfaxhad not been divested, and this decision was considered by Justice Johnson, who dissented, as overruling the case of Smith vs. Maryland, supra.

These cases, it will be perceived, relate to the confiscation of the property of an enemy, and yet even in such case, wholly inapplicable to the position of a citizen of the United States resident in the Indian Territory, the pronounced disposition of these earlier decisions was to require a judicial ascertainment of the fact by inquest of office or equivalent proceeding to consummate the forfeiture of property of an alien enemy. The legislation of congress providing for the confiscation of property of those engaged in rebellion always provided for judicial ascertainment of the fact. Even under this confiscation act providing for a hearing and a judicial determination of the grounds of forfeiture, there was in the case of Miller's Executor vs. United States, 11 Wall. 286, a strong dissent by Justice Field and Justice Clifford from the judgment of the court affirming the judgment of the lower court upon the ground that statutory proceedings in rem for the confiscation of the property of the parties charged to be guilty of certain overt acts of treason could not be maintained without their previous conviction for the alleged offenses, the property seized not having been rendered subject to forfeiture by guilty use in the course of war, but being proceeded against simply as the property of an enemy.

In the case of McVeigh vs. United States, 78 U. S. Rep. 259, which was a proceeding under the Confiscation Act to confiscate

certain real estate of the plaintiff in error, plaintiff in error by counsel interposed a claim and filed an answer. The attorney for the United States filed a motion that the appearance, answer and claim should be stricken from the files for the reason that the respondent was a resident of the City of Richmond, withir the Confederate lines, and a rebel. An order was made accordingly to the motion. Subsequently a decree pro confesso was taken. The Supreme Court said: "In our judgment the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy and hence could have no locus standi in that forum. If assailed there he could defend there. The liability and the rights are inseperable. A different result would be a blot upon our jurisprudnce and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice. Whether the legal status of the plaintiff in error was or was not that of an alien enemy is a point not necessary to be considered, because apart from the views we have expressed, conceding the fact to be so, the consequences assumed by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is true he is liable to be sued and this carries with it all the means and appliances of defense."

So in the case of Lasere vs. Rochereau, 84 U. S., the property of the plaintiff in error was proceded against by an action upon

two mortgages. The property was taken into custody and returned on the notice of demand of payment made that plaintiff had left the city and state without leaving an agent to represent him. A curator ad hoc was thereupon appointed, and judgment was rendered against plaintiff in error. It appeared that at the time of the institution of hisproceeding he had been expelled from the city of New Orleans by military order, and that his absence from New Orleans was enforced and involuntary. The court said: "It is contrary to the plainest principles of reason and justice that any one should be condemned as to person or property without an opportunity to be heard. The point here involved was decided by this court in Dean vs. Nelson, 10 Wall. 172. It was there said, "The defendants in the proceedings, meaning the original proceedings, the appellees here, were within the Confederate lines at the time and it was unlawful for them to cross those lines. Two of them had been expelled from the Union lines by military authority and were not permitted to return; the other Benjamin May had never left the Confederate lines. A notice directed to them and published in a newspaper was a mere idle form. They could not lawfully see or obey it. As to them the proceedings were wholly void and inoperative. The case thus condemned is substantially the one before us."

The propositions contended for herein have existed immemorially in the law in England, and are expressed in the maxim that no man shall be condemned unheard. Thus a statute establishing a gas light company enacted that if any person should refuse or neglect for a period of ten days after demand to pay any rent due from him to the company for the supply of gas, such rent should be recov-

ered by the company or their clerk by warrant of a justice of the peace and execution thereunder. A warrant issued by a justice under this act without previously summoning and hearing the party to be distrained upon was held to be illegal, though summons and hearing was not in the term of the act, for a warrant is in the nature of an execution. It was said: "Without a summons the party charged has no opportunity of going to the justice, and a man shall not 'suffer in person or purse without opportunity of being heard.'" Painter vs. Liverpool Oil, Gas, Light Co., 3 A. & E. 433; Hammond vs. Bendyshe, 13 Q. B. 869. The Metropolitan Local Management Act, 1855, 18 and 19 Vict. Ch. 120, Sec. 76, empowered the vestry or district board to order or demolish a house where the builder had neglected to give notice of his intention to build seven days before his beginning to lay or dig the foundation. It was held that this enactment did not empower the board to demolish the building without first giving the party opportunity of being heard. For "that a tribunal which is by law invested with the power to affect the property of one of Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds, is a rule that is of universal application and founded upon the plainest principles of justice." Cooper vs. Monsworth Board of Works, 14 C. B. N. S. 180.

The decisions were made in England where the theoretical supremacy of Parliment and its power to do anything by act of legislation is asserted. It is a part of the immemorial common law of England, maintained even when the perogative of the crown was at its height, that the subject could not suffer deprivation of prop-

erty at the instance of the crown except as the law should be enact and appropriate legal proceeding declared. Thus Mr. Blackstone in discussing the methods of redressing such injuries as the crown may receive from the subject says: "Such is that of inquisition, or inquest of office; which is an inquiry made by the king's officer, his sheriff, coroner, escheator, **virtute officii,** or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitled the king to the possession of lands or tenements, goods or chattels. This is done by a jury of no determinate number, being either twelve, or less, or more. As, to inquire whether the king's tenant for life dies siesed, whereby the revision accrues to the king; whether A., who held immediately of the crown, died without heirs, in which case the land belong to the king by escheat; whether B. be attainted of treason, whereby his estate is forfeited to the crown; whether C. who has purchased lands, be an alien, which is another cause of forfeiture; whether D. be an idiot, **a nativitate,** and therefore, together with his lands, appertains to the custody of the king; and other questions of like import, concerning both the circumstances of the tenant and the value or identity of lands. . . . . With regard to other matters, the inquests of office still remain in force, and are taken upon proper occasions; being extended not only to lands, but also to goods and chattles personal, as in the case of wreck, treasure trove and the like; and especially as to forfeitures for offenses. * * * * These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record, without which he, in general, can neither take nor part from anything. For it is a part of

the liberties of England, and greatly for the safety of the subject, that the king may not enter upon and seize any man's possession upon bare surmise without the intervention of a jury." 3 Blackstone, p. 258, 259.

The proposition is believed to be unqualified and absolute, that the power does not exist anywhere within the territorial limits of the United States to take from an individual property rights without a hearing by mere force of statutory enactments. Certain summary proceedings permitted to a government in the exercises of its necessary powers do not contravene this proposition. Thus it is permitted the State or the sovereignty to collect taxes by summary proceedings and to have writs of execution issued against officers of the government for balances of indebtedness. It is permitted the government in the exercise of its police power to destroy property to arrest a fire, or to prevent the spread of disease, and cases have arisen in which the summary destruction of property seized while being used for criminal purposes has been upheld as proper exercise of the police authority, as in the destruction of gambling paraphernalia and fish nets unlawfully spread in the streams. These cases however relate to the exercise of particular powers of government necessarily involving expeditious modes of procedure, and are not the foundations of any general doctrine as to the power of the state to take the property of the individual through the mere exertion of the legislative power.

The case of Atlantic & Pacific Railroad Co. vs. Mengus, 165 U. S. 413, cited by appellant, decides that when the United States grants public lands upon condition subsequent, they have the same

right to re-enter upon a breach of the condition which a private grantor would have under the same circumstances, which right is to be exercised by legislation, and is based upon the elementary learning that the title of the grantor in case of the breach of condition subsequent is not revived by the mere happening of the breach but only revives upon his making entry or doing that which is its equivalent, and such equivalent act of entry where the sovereignty is the grantor can only be made by legislative declaration.

The same principle is involved in United States vs. De Repentiguy, 72 U. S. 646. Other cases cited by appellant are distinguishable upon the grounds so obvious and palpable that they do not require consideration.

VI.

Such sale was a nullity and ineffectual to pass any right to plaintiff, (a) because of the failure of the officer to comply with the terms of the Indian statute; (b) because, under the general rules of law, of the inadequacy of the consideration and the circumstances of fraud attendant upon the sale

It will be observed that the Choctaw statute requires the sheriff to sell to the highest Choctaw citizen bidder for cash, one-half of which should be paid into their respective treasuries and the other half into the national treasury. It is shown by the testimony of William Ansley, who made the sale, and of W. H. Ansley, his son, the plaintiff, that no money was paid at the sale at all, that the deputy making the sale accepted notes to the sheriff and his successor in office to the amount of the bids, conditioned that the same should be paid as soon as the purchasers were put in possession by

the Nations or obtained possession otherwise.

The claim that this was a sale passing title to the purchasers seems absolutely childish, but as the contention is pressed that this sale was valid under the Indian law and vested title to the property in question in the purchasers, authorities to the contrary will be cited.

An extract from Freeman on Executions, Art. 300, with the authorities given by him, is deemed sufficient for this purpose. He says: "The officer is not authorized to sell on credit; nor has he any authority to accept payment otherwise than in cash. Nagler vs. Stewart, 10 S. & R. 207, Isler vs. Andrews, 66 N. C. 552, Robbinsvs. Bellas, 2 Watts. 359. * * * The purchaser who has not compiled nor offered to comply with his bid has acquired no interest in nor right to the property sold and can maintain no action or proceeding in regard thereto. The People vs. Hayes, 5 Cal. 66, Hardesty vs. Wilson, 2 Gil 181, Davis vs. Prvor, 6 S. & W. 114, Williams vs. Smith, 6 Cal. 91, Askew vs. Ebberts, 22 Cal. 263, Leach vs. Koening, 55 Mo. 451."

The plaintiff Ansley not merely has not complied with his bid, he in fact has never made a bid. He not only has not paid cash as required by the Choctaw statute, but he is under no obligation to pay cash. His position is, "if this court will give me property which I state in my complaint to be worth $60,000 and which cost $85,000, I will pay the Choctaw Nation $270, otherwise I will pay it nothing." Such a proposition it is believed was never before seriously urged in any court.

Appellant's action finds no foundation in law, equity or honesty.

It is obviously a speculative venture, whereby without the payment of one dollar and without being bound to pay a single dollar unless he succeeds, appellant seeks to obtain property worth from fifty thousand to a hundred thousand dollars.

We beg, in conclusion, to call the attention of this court, to the opinion of the United States Court of Appeals in the Indian Territory, and to the opinion of the United States Circuit Court of Appeals for the Eighth Circuit, in this case; and to the opinion of the Commissioner of Indian Affairs, representing the Interior Department, in this matter: all of which sustain the contention of the appellees herein, and deny the appellant any rights in the premises.

We direct the attention of this honorable court especially to the opinion of the Interior Department, above referred to, because it reviews the history of the whole controversy. In contest cases Nos. 1401, 1404, 1405, pending before the Commissioner of Indian Affairs, we beg to quote as follows from the decision of the Commissioner, and make same a part of this brief:

"* * * * The contestees claim ownership of the property in controversy by reason of purchase from J. W. McLoud, trustee, representing the Choctaw Coal and Railway Company. On December 13, 1895, the contestant herein filed a suit in equity in the United States Court at South McAlester, praying that his title to the property herein be quieted, setting forth his purchase for a valuable consideration at the sheriff's forfeiture sale.

"On May 28, 1902, judgment was rendered by the court in favor of the contestee, and thereupon the contestant appealed to the United

States Court of Appeals for the Indian Territory. In October, 1904, the appellate court confirmed the judgment of the lower court. The case was thereafter appealed to the United States Court for the Eighth Circuit. The decree of the lower court was again affirmed in a decision rendered May 23, 1905, (Walker vs. McLoud, 138 Fed. Rep. 394), and in passing on the rights acquired under sheriff's sale, the court uses the following language:

'Several objections are made to the plaintiff's title or right of recovery. But one of them will be considered.

The act of the Choctaw Legislature under which the plaintiff claims did not purport to transfer the title or right to improvements made or bought by a non-citizen, except upon a sale by the sheriff 'to the highest Choctaw citizen bidder for cash.' An officer making a sale under such a statute must yield obedience to its directions. He cannot sell upon credit or accept any other than an unconditional cash bid. So, also, a purchaser whose bid is made and accepted in disregard of the directions of the statute, or who does not pay the purchase price, acquires no interest in or right to the property.

The sale under which the plaintiff claims was so obviously and so grossly in violation of the directions of the statute that it was and is of no effect.

"The contestants in their appeal contend that the present case differs from the case of Walker vs. McLoud, supra, in that the Choctaw Nation is a party thereto whereas it was not a party in that case, and its rights were therefore not considered. It is urged that the Nation, through its chief, signifies its assent to the sheriff's sale; that the sale was made in accordance with the usages and

customs of the nation, and the construction of the law under which it was made, and that forfeiture having taken place by virtue of the statute itself, no one but the nation can raise the question as to the regularity of the sale.

"It is further contended that if this office should find the sale to be invalid, then it is its duty to schedule the property to the nation by reason of the title acquired thereto by virtue of the forfeiture.

"It is a familiar rule of law that when a person seeks to establish a right under and by virtue of a statutory enactment he must abide by the terms thereof. It is equally well established that sales made in pursuance of statutes providing for the involuntary alienation of property must be made strictly in accordance with the provisions of the law, otherwise the sale is void and no interest is acquired by the purchaser. The statute under which the sale in this case was made is clear and specific as to the manner in which payment is to be made, and the sale in this respect is plainly a gross violation of the express terms of the law, under which Ansley seeks to establish his rights. He therefore acquired no right in and to the property in controversy.

"Without passing on the authority of the chief of the Nation, by becoming a party to this contest, to make valid a sale which, according to the terms of the law authorizing it, is clearly invalid, the question of the rights of the nation herein will be next considered.

"The court of Appeals of the Indian Territory, in its decision in the case of Walker vs. McLoud, since affirmed as above mentioned,

in passing on the question of forfeiture to the Choctaw Nation of the property in question, after quoting section 7 of the Treaty of 1855, and Article 43 of the Treaty of 1866, relating to the rights of the nation to pass laws respecting non-citizens, says:

It thus appears that certain classes of non-citizens were allowed to come in the Choctaw Nation, but in no provision of any treaty that our attention has been called to is there any authority given to these tribal governments to enact any legislation that shall affect or control non-citizens or their property. Is not this absolutely essential before any validity can be given to the act of the Choctaw Council?

Without express authority by treaty or some act of Congress, empowering the Choctaw Council to enact any such legislation pertaining to citizens of the United States and their property, we are of the opinion that said act of forfeiture is without validity.

"It therefore seems to be well established that this particular property has never been legally disposed of by the Nation, and that no forfeiture to the nation has ever taken place."

Wherefore appellees pray that the judgment of the lower court be affirmed.

JOHN W. McLOUD,
CHARLES B. STUART,
Attorneys for Appellees.